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In the Supreme Court of the United States

TERM, 1963

No. 814

W. M. DANIELS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee,*

vs.

INTERSTATE COMMERCE COMMISSION, and GREAT NORTHERN RAILWAY COMPANY,
Intervening Appellees,

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM JUDGMENT OF THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BUTTE DIVISION.

JOHN W. BONNER
SIDNEY O. SMITH
Attorneys at Law
303 Union Bank Building
Helena, Montana
Attorneys for Appellant.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, *Appellee*,

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INTERSTATE COMMERCE COMMISSION, and GREAT NORTHERN RAILWAY COMPANY,

Intervening Appellees,

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM JUDGMENT OF THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BUTTE DIVISION.

I.

APPEAL

1. W. M. DANIELS, appellant, hereby appeals from a judgment of a three-judge United States District Court for the District of Montana, Butte Division, entered October 29, 1962, dismissing plaintiff's complaint.

2. Appellant's petition for rehearing and motion for new trial filed October 30, 1962, was denied by supplemental per curiam opinion and order of said Court entered December 14, 1962.

3. Appellant filed and served timely Notice of Appeal to the United States Supreme Court, with proof of service certificate, in said Court January 11, 1963, included in transcript on appeal.

II.

JURISDICTIINAL STATEMENT

OPINIONS BELOW

1. Opinion and order and final judgment of three-judge United States District Court entered of record October 29, 1962, in said Court is unofficially reported in _____, 1963. Advance Sheets of Opinions, and not yet officially reported.

Opinion and order and final judgment shown at page 23 of Appendix.

2. Supplemental opinion and order denying plaintiff's petition for rehearing and motion for new trial entered of record in said Court, December 14, 1962, is unofficially reported in _____, 1963, Advance Sheets of Opinions, and not yet officially reported. Opinion and order shown at page 41 of Appendix.

III.

GROUNDS FOR JURISDICTION OF COURT

The jurisdiction of this Court is invoked upon the following grounds:

1. Conflicts in Montana Supreme Court decision and three-judge United States District Court decision.

Appellant contends the Montana Railroad Commission Interstate Permit M.R.C. No. 284 certificate of public convenience and necessity authorizing operations wholly interstate in Montana lawfully issued to him in the year 1933 is a valid certificate and eligible for registration under the provisions of section 206(a)(1), Title 49 U.S.C., Part II of the Interstate Commerce Act, known as the Federal Motor Carrier Act of 1935.

Decision of Montana Supreme Court

Appellant's position is fully supported by the decision in the case of W. W. Daniels (Appellant here) v. Board of Railroad Commissioners of the State of Montana, 131 Mont. 9, 306 P. 2d 264, decided in the year 1957.

Decision of three-Judge United States District Court, District of Montana

The final judgment appealed from holds the said certificate is not eligible for registration under Section 206(a)(1), Title 49 U.S.C. upon the following grounds:

1. In 1931 or at any time prior to the enactment of the Federal Motor Carrier Act of 1935, the State of Montana did not have authority to issue interstate certificates of public convenience and necessity for the transportation of property interstate between points in Montana.

2. After the 1935 Federal Motor Carrier Act no power at all was left in the States to determine what carriers could or could not operate in interstate commerce.

3. While it was within the power of Congress to grant a state the right to determine whether public convenience and necessity required interstate authority within that state, and to make state issued interstate certificates eligible for filing under a second proviso of Section 206(a)(1), Title 49, U.S.C., such power has not been granted unless it was conferred by the proviso itself.

4. That the only reasonable construction of the second proviso (Section 206(a)(1), Title 49 U.S.C.) is that adopted by the Commission, i. e., to authorize carriers with intrastate certificates to obtain interstate authority over the same route without proof of public convenience and necessity under Section 207, Title 49 U.S.C.

Administrative Ruling No. 5 by the Director of the Bureau of Motor Carriers Was Unlawful Legislating

2. Ruling No. 5 by the Director of the Bureau of Motor Carriers, made August 19, 1936, was unlawful

legislating by interpreting the intention of Congress under Section 206(a)(1) to mean that ownership of an intrastate certificate was a prerequisite to eligibility of an interstate certificate for registration.

Conflict exists between Ruling No. 5 and Ruling No. 7 made by the Director August 19, 1936, as the interpretation of the intention of Congress under Section 206 (a)(1). Ruling No. 7 states:

> "Question. If a common carrier operating wholly intrastate in interstate commerce procures a certificate from the State Commission authorizing an extension wholly within the State, is anything more than registration of such extension required by the Interstate Commerce Commission?
>
> "Answer. If a carrier operating in interstate commerce solely within a single State procures a certificate of convenience and necessity from the board of that State authorizing the extension, such operation, as extended, being wholly within such State, no proceedings other than registration with this Commission are required for such authority to be recognized as interstate authority."

Ruling No. 5 was promulgated by an employee of the Commission as Director of the Bureau of Motor Carriers, without notice or hearing to certificate holders affected thereby and without following any legal procedure for promulgating such rulings. It is unlawful legislating which has deprived the appellant of his property for many years.

Ruling No. 7 provides that appellant may secure an

extension of the exact kind of interstate certificate which he now holds, if considered to be an extension of the operations conducted by him wholly intrastate in interstate commerce, yet registration of the said certificate has been refused and necessitated this action.

IV.

NATURE OF PROCEEDINGS AND STATUTE INVOLVED

This action arose under the provisions of Chapter 8, Interstate Commerce Act, Part II Motor Carriers, Title 49, U.S.C. Section 201, et seq.

Appellant as the original owner and holder of Montana Interstate Permit M.R.C. No. 284 certificate of public convenience and necessity, on March 8, 1957, tendered a Form BMC (Bureau of Motor Carriers) 75 statement of intent to conduct operations in interstate transportation of property wholly between intrastate within Montana, as provided in Section 206(a)(1), Title 49, in operations corresponding to the operations authorized in his M.R.C. No. 284 authority, which tender the Director of the Bureau of Motor Carriers returned by letter of March 18, 1957, advising the tender was unacceptable because the certificate authorized interstate rather than intrastate operations, referring to Ruling No. 5.

Appellant again on February 3, 1958, tendered his Form BMC 75 statement of intent to conduct interstate

operations for registration, which tender the Director of the Bureau of Motor Carriers returned by letter of February 11, 1958, advising the tender was unacceptable for the same reasons and referring to Ruling No. 5.

Appellant then challenged the validity of this action by the Director of the Bureau of Motor Carriers by filing a complaint in the United States District Court for the District of Montana, Helena Division. That action was dismissed upon stipulation by the parties after the Commission of its own motion and order instituted an investigation of the eligibility of said certificate for registration under Section 206(a)(1) of Title 49 U.S.C., by its order dated January 23, 1959. By an order of May 23, 1960, the matter was assigned for handling under the modified procedure and the statement of facts contained in a joint stipulation of the Bureau and respondent was received in evidence by the Commission.

After the investigation the report and order recommended by the examiner was adopted by order of Division I of the Interstate Commerce Commission as of March 28, 1961, in Docket No. MC-C-2507, to which appellant filed exceptions and thereafter on November 21, 1961, the report of the Commission, Division I, and order were issued, and became the final judgment of the entire Interstate Commerce Commission.

Appellant's petition for re-consideration of Division I Report of November 21, 1961, by the entire Commission, was given file number 824372, December 18, 1961, and returned as rejected by letter of December 26, 1961, from the Secretary of the Commission advising the decision and order of Division I was administratively final under the order of the entire Commission dated January 4, 1961, amending paragraph (2) of Section 1.101 of the General Rules of Practice of the Interstate Commerce Commission.

The final decision and order of November 21, 1961, made the following findings:

> "We find that W. M. Daniels has failed to establish that operation by him in interstate or foreign commerce, corresponding to his certificate issued by the State of Montana, fall within the partial exemption of the second proviso of Section 206(a)(1) of the Interstate Commerce Act; and that, therefore, the statement of intent to operate in interstate or foreign commerce by W. M. Daniels, should be disapproved and rejected.
>
> "We further find that W. M. Daniels may not conduct operations, in interstate or foreign commerce, corresponding to his certificate issued by the State of Montana in the absence of appropriate authority from this Commission."

Appellant then commenced this action in proper time under Title 28 U.S.C.A. 2323 and the provisions for appeal to a three-judge Court under Title 28 U.S.C.A. Sec-

tions 2325 and 2284. Appellant had exhausted all of the required administrative remedies before the Interstate Commerce Commission before commencing this action.

STATUTE INVOLVED

The statute involved is Title 49 U.S.C. Section 201, et seq., which is known as the Federal Motor Carrier Act of 1935.

The 1962 Amendment (shown in Appendix at page 45) approved in October, 1962, is designated as Public Law 87-805, 87th Congress, S. 320, October, 1962, is an amendment of Section 206(a)(1) Title 49, the section involved herein.

Appellant did not learn of this amendment until the time of petition for rehearing and motion for new trial when the matter of the amendment was included therein for consideration. It can not be applied retroactively.

(Shown in Appendix at page 45).

V.

JUDGMENT SOUGHT TO BE REVIEWED

1. Date of entry of judgment: October 29, 1962.

2. Date of Order denying rehearing and motion for new trial: December 14, 1962.

3. Date of Notice of Appeal: January 11, 1963.

4. Court in which appeal filed: In the United States District Court for the District of Montana, Butte Division, Federal Building, Butte, Montana.

VI.

STATUTORY PROVISIONS CONFERRING JURISDICTION ON THIS COURT

1. Title 28 U.S.C. Sec. 1253, provides for appeals direct to the United States Supreme Court from a judgment of a duly constituted and properly called three-judge United States District Court.

2. The three-judge United States District Court was properly called pursuant to Title 28 U.S.C. 2323 and duly constituted pursuant to Title 28 U.S.C. Sections 2325 and 2284.

VII.

AUTHORITIES TO SUSTAIN JURISDICTION

Authorities believed to sustain the jurisdiction of this Court, are as follows:

Alabama Public Service Commission, (1951), three-judge Court, 341 U.S. 341;

Loring v. U.S. D.C. Okl., 32 F. Supp. 464, Affirmed, 60 S. Ct. 898, 310 U.S. 609, 84 L. Ed. 1387;

Glacier Mountain Silver Mining Co., v. Willis, 8 S. Ct. 1214, 32 L. Ed. 172, 127 U.S. 471;

Grubb v. Public Utilities Commission, 281 U.S. 470;

Oswego Transportation Lines v. Feinberg, 181 N.Y.S., 2d 1007;

Interstate Commerce Commission v. Jersey City, 306 U.S. 268;

Eichholz v. Hargus, 23 U.S. 587, aff. 306 U.S. 268.

VIII

CONSTITUTIONALITY OF STATE STATUTES

Appellees' contentions were upheld by the judgment appealed from that Section 8-123, Revised Codes of Montana, 1947, providing for the issuance by the Montana Board of interstate certificates of public convenience and necessity between points wholly intrastate in Montana is void and unconstitutional, whether such certificates were issued after the Federal Motor Carrier Act enacted in 1935 or were issued prior to said 1935 Act.

Appellees' admit it was within the power of Congress to grant a state the right to determine whether public convenience and necessity required interstate authority within a state and to make state issued interstate certificates eligible for registration under Section 206(a)(1), pursuant to the plenary power of Congress over interstate commerce derived from Article I, Section 8, cl. 3 of the United States Constitution; but appellees contend such power has not been granted unless it was conferred by Section 206(a)(1).

APPELLANT CONTENDS CONGRESS GRANTED SUCH POWER TO MONTANA

Appellant contends Congress granted such power above referred to by conferring it under Section 206(a)(1). No question was raised with respect to an exemption for intrastate certificates. therefore, no explanation was made respecting state issued intrastate certificates; but, an explanation was necessary in respect to state issued interstate certificates as provided in the Montana Act of 1931, and prior to the vote upon the Federal Act in the Senate on April 16, 1935, Senator Burton K. Wheeler, Chairman of the Interstate Commerce Committee of the Senate made the following statement of the intention of Congress to clarify any conflicts of state and federal power and the delegation of power from the federal government to the state government, found in 72 Congressional Record at page 5654:

> "Where a common carrier is engaged in interstate transportation but conducts his operations solely within a State and holds a certificate from that State, he is not required to apply for a federal certificate but is otherwise subject to federal registration."

Appellant contends that Section 8-123, Revised Codes of Montana, 1947, under which the interstate certificate in question was lawfully issued is not void and unconstitutional by reason of the grant of power conferred in Section 206(a)(1) and to hold otherwise is contrary to the

explanation of Senator Burton K. Wheeler, which has never been changed by Congress, and is unlawful legislating. That the Federal Act of 1935 must be construed in the light of the circumstances existing at the time of its passage. (Louisville & N. Rd. Co. v. Mottley, (1911), 219 U.S. 467, 474, 31 Sup. Ct. Rep. 265, 55 L. Ed. 297).

(Sec. 8-123 shown in Appendix at page 45).

United States v. United Verde Copper Co,, 196 U.S. 207;

Doran v. Colonial Drug & Sales Co., (CA 10) 58 F. 2d 65, pp. 67, 68.

In respect to the arbitrary and unlawful cancellation in 1951 by the Montana board, which resulted in the litigation in the state and federal courts and prevented appellant from conducting the operations authorized, attention is directed to the following excerpts from the Order of the Examiner adopted by Division 1 of the Interstate Commerce Commission March 28, 1961, as follows:

> "* * * the Bureau—it asserts that to the extent the Board granted respondent interstate authority based on a showing of public convenience and necessity, it did so in violation of Article I, Section 8 of the U.S. Constitution, and therefore such authority is void * * *."
>
> "* * * The (Montana) Board filed a brief for the purpose of clarifying its position. Under Montana statutes it has the duty and authority to regulate, supervise, and control transportation of persons and property for hire by motor vehicle within

the State of Montana, including the regulation of interstate carriers to the extent not inconsistent with Part II of the Interstate Commerce Act.

"Prior to the passage of the Federal Motor Carrier Act of 1935, it issued interstate permits upon a showing of public convenience and necessity, but subsequent to that time it has issued them only after the filing of authority granted by this Commission, and to the same extent.

"Its records indicate that respondent holds no intrastate authority. The Board explains its attempted cancellation of respondent's State certificate as based on its view that interstate authority issued by it before passage of the Federal Act became invalid and without force and effect unless certificates were obtained from this Commission based on "grandfather" operations or proof of public convenience and necessity * * *."

Appellant believes no other Montana interstate certificates were likewise cancelled by the Montana board upon the grounds above set forth, nor any other Montana interstate certificates of public convenience and necessity were denied registration by the Interstate Commerce Commission, and it would seem appellant has been denied the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. Appeal is made to this Court for such protection.

In New Jersey v. U.S. 168 Fed. Supp. 324, at pp. 331-332, it is stated:

> "The exercise by Congress of such powers as over interstate commerce can only be accomplished by legislation which measures the scope of the exercise of such power. Until a particular aspect in the field of interstate commerce has been regulated by Congressional enactment, the States are free to exercise their police power or other governmental powers therein."

It is unconstitutional to deprive appellant of his property by the Director's Ruling No. 7 hereinbefore referred to, or by the final report and order of the Interstate Commerce Commission of November 21, 1961, or by the final judgment of the three-judge United States District Court. Appellant contends that the decision of the Montana Supreme Court in Daniels v. Board, in the year 1957, 131 Mont. 9, 306, P. 2d 264, was final and conclusive in respect to the validity of said certificate and the property rights of appellant and res judicata.

The United States Supreme Court in ruling upon the 1931 Montana Motor Carrier Act in Board of Railroad Commissioners v. Aero Mayflower Transit Co., 119 Mont. 118, 172 P. 2d 452, 459, in 332 U.S. 495, 94 L. Ed. 99, 68 S. Ct. 167, affirmed and upheld the Montana Motor Carrier Act and the validity of both intrastate and interstate certificates issued by the Montana Board, without any distinction being made whether such certificates were required by law to be issued jointly, separately, or simultaneously. Also see Grubb v. Public Utilities Commission, (Ohio), 281 U.S. 470.

The existence of the Director's Administrative Ruling No. 7 for many years does not make it lawful. Loring v. U.S. D.C. Okl. 32 F. Supp. 464, Affirmed, 60 S. Ct. 898, 310 U.S. 609, 84 L. Ed. 1387; Anderson v. United States Civil Service Commission, 119 F. Supp. 567.

This Court has consistently recognized state statutes and decisions in existence prior to the enactment of federal legislation with respect to the acquisition of ownership of mining claims upon federal land. Glacier Mountain Silver-Mining Co., v. Willis, 8 S. Ct. 1214, 32 L. Ed. 172, 127 U.S. 471.

IX.

QUESTION PRESENTED BY THIS APPEAL

Whether W. M. Daniels, appellant herein, is entitled, under the Federal Motor Carrier Act, (Title 49 U.S.C. Secs. 201, et seq.,) by filing his intention to operate Form Bureau of Motor Carriers 75 with the Interstate Commerce Commission, to have registered his Montana Interstate Permit M.R.C. No. 284, certificate of public convenience and necessity authorizing motor carrier common carrier operations to transport property between Missoula and Helena and Miles City via Butte, and between Butte and Great Falls, all in Montana, under existing constitutional and statutory authority; the validity of which was upheld by the Montana Supreme Court in the year 1957 as a currently existing certificate in respect to which the subsequent Federal Motor Carrier Act of 1935 would not

apply. (W. M. Daniels v. Board of Railroad Commissioners, 131 Mont. 9, 306 Pac. 2d 264).

X.

MATERIAL FACTS FOR CONSIDERATION OF THE QUESTION

Material facts for consideration of the question presented are as follows:

Appellant's Montana Railroad Commission Interstate Permit certificate of public convenience and necessity M.R.C. No. 284 authorizing operations wholly intrastate between points in Montana was issued to appellant upon making the required showing of public convenience and necessity. Montana is a bridge traffic state and the greater volume of traffic is interstate traffic which public convenience and necessity required to be transported between intrastate points within the State of Montana from and to the Montana terminal points of out-of-state interstate operators.

Appellees' contention that the Federal Act requires the prior issuance of intrastate state certificates before an interstate certificate is eligible for registration is not logical when consideration is given to the fact the State of Montana bridge interstate traffic requires more interstate certificates than intrastate certificates. That is the reason the Legislature provided for both intrastate and interstate certificates, and the requirement of proof of public conveni-

ence and necessity prior to the issuance of interstate certificates between points within the State of Montana. Congress delegated such authority to the Montana Board because of its knowledge and experience in regard to both intrastate and interstate operations within the State of Montana.

Appellant, a pioneer motor carrier operator in Montana since about 1919, owned and operated various intrastate and interstate transportation services under authorities acquired by him by application or transfer over a period of many years. Such certificates authorized different classifications of motor carrier services, i. e., common carrier class "A" and class "B", and contract carrier class "C" as provided by the Montana Act of 1931.

The period from 1919 to 1931 was the formative period of motor vehicle services in Montana before the larger motor carrier corporations came into existence, and from 1931 to 1935 appellant contributed to the development of the motor carrier industry in Montana by rendering services to the public. The various certificates acquired by appellant were combined by the Montana Board under the number M.R.C. No. 284 only for identification purposes, and any reissuance of any certificate by the board did not mean redetermination of public convenience and necessity, whether before or after the Federal Act of 1935.

The certificate involved herein is separate and distinct from any and all other operations of appellant and no other proceedings before the Interstate Commerce Commission has any bearing upon this action.

During the World War II period, to assist the war effort, appellant ceased certain operations at the request of the Interstate Commerce Commission, and thereafter shortages of equipment and manpower and litigation caused by the cancellation of the certificate involved herein prevented appellant from operating, which circumstances are excusable under the statutes. Appellant over the years of litigation has had requests for the furnishing of the services authorized by said certificate but he is a poor man and without finances sufficient to contest and test any charges of violations because of the threat of extreme penalties of $100.00 a day for the first offense and $500.00 a day for each day of subsequent violation of the Federal Motor Carrier Act, unless registration be accepted by the Interstate Commerce Commission, so it is obvious why he does not dare to operate. Under such circumstances appellant is prevented from negotiating and arranging for the services which have been requested of him at the present time because of the great need existing for interstate operations between points within Montana.

Appellant proposes the parties stipulate to sufficient of the material facts as are necessary for the considera-

tion of the legal question involved to save the expense of printing the voluminous transcript of proceedings befor the Commission, which is the same record as was used before the three-judge Court and save the Court the time of reviewing the entire record.

XI.

STATEMENT WHY QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR THEIR RESOLUTION.

The legal questions presented is one first impression before this Court and involves the interpretation of the Federal Motor Carrier Act enacted in 1935 in respect to conflicts of state and federal powers, and the intention of Congress under Section 206(a)(1), Title 49 U.S.C. to confer power to the State of Montana to issue the interstate motor carrier certificate involved herein, and to require the registration of said certificate by the Interstate Commerce Commission, which is the purpose of this litigation and it can be resolved only by this Court in view of the previous conflicting decision of the Montana Supreme Court referred to herein.

XII.

CONCLUSIONS

That W. M. Daniels has established that operations by him in interstate or foreign commerce, correspond-

ing to his certificate issued by the State of Montana, M.R.C. Interstate certificate of public convenience and necessity for operations between the points designated are eligible for registration under Section 206(a)(1) of Titl 49, U.S.C., and that, therefore, the statement of intent to operate should be approved and registered.

APPENDIX "A"

OPINIONS BELOW

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Filed Oct. 22, 1962
Dean O. Wood, Clerk
by E. P. Riordan,
Deputy Clerk
Civil No. 896

W. M. DANIELS,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant

and

INTERSTATE COMMERCE COMMISSION, and
GREAT NORTHERN RAILWAY COMPANY,
Intervening Defendants.

PER CURIAM:

This is an action to review an order of the Interstate Commerce Commission dated November 21, 1961, in Docket No. MC-C-2507, W. M. Daniels—Investigation of Second Proviso Eligibility. The sole question presented is whether plaintiff's interstate operations in Montana, pursuant to his Montana Interstate Permit M.R.C. No. 284, fall within the partial exemption of the second proviso of Section 206(a)(1) of the Interstate Commerce Act.

Under Section 206(a)(1) (49 U.S.C.A. Sec. 306(a)(1), except as otherwise provided therein" * * * no common carrier by motor vehicle * * * shall engage in any interstate or foreign oeration on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the commission authorizing such operation." The first proviso contains a "grandfather" clause which authorizes the issuance of certificates to carriers in operation prior to June 1, 1935.[1] Plaintiff does not claim any rights under this proviso. The second proviso reads in pertinent part:

> "provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in *interstate* or foreign commerce between places within such State if there be a board in such state having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

By statement filed February 3, 1958, plaintiff gave notice of his intention to engage in the transportation of property, in interstate or foreign commerce in Montana, under the second proviso of Section 206(a)(1), in operations corresponding to those authorized in his Montana

[1] This was the effective date of the Motor Carrier Act of 1935, 49 U.S.C.A., Sec. 301 et seq.

Interstate Permit, M.R.C. No. 284. Plaintiff's statement was rejected by the Commission, the Commission finding (1) that plaintiff had failed to establish that his operations in interstate commerce in Montana would come within the partial exemption of this proviso and (2) that plaintiff was not authorized to engage in interstate commerce by virtue of the permit issued by the Montana Board.[2]

Prior to the enactment of the Motor Carrier Act of 1935, plaintiff obtained a certificate from the Board of Railroad Commissioners of the State of Montana authorizing interstate as well as intrastate operations.[3] On January 22, 1936, the Board reissued the certificate, with all amendments, in one document; M.R.C. No. 284, which authorized the transportation of property as a Class A carrier, in intrastate and interstate service, between the following Montana points:

(1) Butte and Philipsburg, via Anaconda;

(2) (a) Missoula and Helena.

(b) Missoula and Butte,

(c) Butte and Miles City;

(d) Butte and Great Falls,

as a connecting carrier in interstate commerce.

---

[2] Reference will be made later herein to prior attempts to qualify under both provisos.

[3] The certificates and permits issued to plaintiff were pursuant to the Montana Motor Carrier Act of 1931, Chapter 184, Laws of 1931 (now R.C.M. 1947, Secs. 8-101 to 8-128).

(3) Butte and Missoula, via Garrison and Deer Lodge, in intrastate commerce, with a limitation that no service shall be given between Butte and Anaconda.

At Plaintiff's request, the Montana Board on March 8, 1943, ordered that plaintiff's operating rights be segregated into three certificates, as follows:

(1) *Intrastate Certificate* of Public Convenience and Necessity M.R.C. No. 284 (reissued) authorizing plaintiff to transport property as a common carrier by motor vehicle in *intrastate* service, Class A, between Butte and Missoula, via Anaconda and Philipsburg, together with the same right or rights between Butte and Missoula, via Deer Lodge and Garrison, except that service between Butte and Anaconda in intrastate service is prohibited.

(2) *Interstate Permit* M.R.C. No. 284 (reissued) authorizing plaintiff to transport property as a common carrier by motor vehicle, Class A, in interstate service between Butte and Missoula, via Anaconda and Philipsburg, together with the same right or rights between Butte and Missoula, via Deer Lodge and Garrison.

(3) *Interstate Permit* M.R.C. No. 284 (reissued) authorizing plaintiff to transport property as a common carrier by motor vehicle, Class A, in *interstate* service between Missoula and Helena; Missoula and Miles City, via Butte; and between Butte and Great Falls.[4]

[4] The minutes of the meeting of the Montana Board of March 8, 1943, contain the following:

"This order is made merely for the purpose of correcting the form of said Certificate No. 284 previously issued on January 22, 1936, by

This proceeding relates to the interstate permit described in subparagraph 3.[5] With respect to operations between Butte and Great Falls, plaintiff applied for a certificate under Section 207(a)[6] of the Interstate Commerce Act, which was granted March 31, 1942, and subsequently sold by plaintiff.[7] By application for registration filed December 31, 1938, and by Form B.M.C. 75, Statement of Intent filed March 8, 1957, and February 3, 1958, plaintiff has sought registration pursuant to Sec. 206(a)(1). Each application was rejected by the Commission.

On May 18, 1951, the Montana Board cancelled plaintiff's certificate or permit without notice or an opportunity to appear or to show cause why it should not be cancelled. The Supreme Court of Montana held that plaintiff accordingly was deprived of a property right without due process of law.[8]

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proper segregation and for no other purpose, and shall not be considered as passing on or a determination of the rights of the holder of said Certificate as originally issued, or by operation thereunder."

[5] The intrastate certificate described in subparagraph 1 was sold by plaintiff, with the approval of the Montana Board, on March 15, 1943. Plaintiff applied for "grandfather rights" with respect to operations under interstate permit described in subparagraph 2. Authority granted pursuant to this application was subsequently sold by plaintiff in two parts, approved by the I.C.C. on December 15, 1942 and September 3, 1943, respectively.

[6] Section 207(a) authorizes the issuance of a certificate to a qualified applicant upon proof of public convenience and necessity.

[7] This sale was approved by the Interstate Commerce Commission on April 24, 1951, Docket No. MC-FC-53226. In the proceeding for a certificate under Sec. 207, plaintiff also contended that he was entitled to "grandfather rights" because of his predecessor's bona fide operations. This claim was rejected by the Commission because plaintiff's predecessor, Independent Motor Carriers, had seasonably filed a "grandfather" application and was denied authority for failure to establish rights under the grandfather clause.

[8] State ex rel. Daniels v. Board of Railroad Commissioners, 1957, 131 Mont. 9, 306 P. 2d 264.

As noted supra, the certificate or permit in question was issued by the Board of Railroad Commissioners of the State of Montana and authorizes *interstate* operations *only* and does not cover any intrastate operations. Nor does plaintiff hold any other intrastate rights over the same route. Plaintiff has not conducted any operations under the permit involved in this action.

Plaintiff contends that the certificate or permit having been issued by the Montana Board authorizing *interstate* operations within the state, h eis entitled to the benefit of the exemption set forth in the second proviso of Sec. 206(a)(1) and that the phrase "such certificates" obviously refers back to the phrase "a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such state." Defendants contend that the second proviso of Section 206(a)(1) refers to *intrastate* certificates of public convenience and necessity; that the phrase "such certificates" means certificates of public convenience and necessity covering intrastate and not interstate operations, and that Congress did not intend by the second proviso to give state boards the right to issue interstate certificates of public convenience and necessity which would entitle them to automatic registration.

We are concerned first with the authority of a state, through its regulatory bodies, to issue interstate certificates of public convenience and necessity *prior* to the Motor

Carrier Act of 1935. It is clear that in the absence of legislation by Congress dealing specifically with the subject, a state could (1) adopt regulations "to promote safety upon the highways and conservation in their use * * * where the indirect burden imposed upon interstate commerce is not unreasonable";[9] and (2) impose "a fair and reasonable nondiscriminatory tax as compensation for the use of its highways."[10] It is equally clear that the state did not have authority to issue *interstate* certificates of public convenience and necessity, in that this would "resort, through state officials, to a test which is peculiarily within the province of federal action—the existence of adequate facilities for conducting interstate commerce."[11]

In the Motor Carrier Act of 1935, "Congress adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing the former power of states

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9 Buck v. Kuykendall, 1925, 267 U.S. 307, 45 S. Ct. 324, 69 L. Ed. 623.

10 Aero Transit Co. v. Com'rs. 1947, 332 U.S. 405, 503, 63 S. Ct. 167 L. Ed. 99.

11 Buck v. Kuykendall, supra. See also Bush Co. v. Maloy, 1925, 267 U.S. 317, 45 S. Ct. 326, 69 L. Ed. 627; Galveston Truck Line Corporation v. Allen, S.D. Tex. 1933, 2 F. Supp. 488, aff'd. in per curiam order, 1933, 289 U.S. 708, 53 S. Ct. 694, 77 L. Ed. 1463; Eichholz v. Commission, 1939, 306 U.S. 268, 59 S. Ct. 532, 83 L. Ed. 641, and Fry Roofing Co. v. Wood, 1952, 344 U.S. 157, 162, 73 S. Ct. 204, 97 L. Ed. 168, upon which plaintiff relies, are distinguishable. In **Eichholz** the Court upheld a state rule requiring an interstate carrier to obtain a certificate to engage in intrastate business, holding that the rule was "designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic." Distinguishing Buck v. Kuykendall, Fry Roofing Co. v. Wood upheld a state requirement for a permit as a contract carrier where the State Commission disclaimed any "discretionary right to refuse to grant a permit * * * where (the) carriage is in interstate commerce," but required no more than registration with the appropriate agency. Even under these facts four justices dissented on the ground that the statute was a regulation of interstate commerce within the rule of Buck v. Kuykendall.

over motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the federal government to make this determination is shown by Sec. 306 of 49 U.S.C.A. (Sec. 206 of Interstate Commerce Act) which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity."[12]

It was, of course, within the power of Congress to grant to a state the right to determine whether public convenience and necessity required interstate authority within that state and to make state issued interstate certificates eligible for filing under the second proviso of Sec. 206(a)(1).[13] This power, however, has not been granted unless it was conferred by the proviso itself.

In determining Congressional intent with respect to this proviso, both parties rely to some extent upon legislative history. With reference to the Act itself, the only other provision which might bear upon the intent of Congress is contained in Sec. 203(a)(2) defining "board" and "state board" as the regulatory body or official having jurisdiction "to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation to

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[12] Castle v. Hayes Freight Lines, 1954, 348 U.S. 61, 63, 75 S. Ct. 191, 99 L. Ed. 68.

[13] The plenary power of Congress over interstate commerce, derived from Article I, Sec. 8, cl. 3 of the United States Constitution, was clearly recognized by the Supreme Court as early as 1824 in an opinion by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23.

notor vehicles, in intrastate commerce over the high-vays" of the state. In the report here under attack, the Commission interpreted the second proviso in relation to he definition of "state board" as follows:

> "The phrase 'to grant or approve certificates of public convenience and necessity . . . in intrastate commerce' should be read in *pari materia* with the second proviso phrase 'to grant or approve such certificates.' We interpret the language in the proviso to mean 'to grant or approve certificates of public convenience and necessity in intrastate commerce."

Plaintiff relies upon a statement made by Senator Burton K. Wheeler, Chairman of the Interstate Commerce Committee of the Senate, in presenting the Motor Carrier Act, where he said in part:

> "Where a common carrier is engaged in interstate transportation but conducts his operations solely within a State and holds a certificate from that State, he is not required to apply for a federal certificate but is otherwise subject to federal registration."[14]

Defendants rely in part upon the report of the Federal Coordinator of Transportation proposing the bill which became the Motor Carrier Act of 1935. The explanation of Sec. 206 reads:

[14] Senator Wheeler's entire statement appears in the Congressional Record for April 15, 1935 (72 Cong. Record 5649-5670) and April 16, 1935 (72 Cong. Record 5735-5737). The part quoted appears at p. 5654. It will be noted that Senator Wheeler referred to "interstate operations" within a state—not to "interstate certificates."

"Section 306 (of the Bill) requires interstate common carries to obtain certificates of public convenience and necessity. It adds a further proviso to Section 4 of the Rayburn bill, to the effect that an intrastate common carrier need not obtain a Federal certificate to engage in interstate commerce between points within the State in which he operates."[15]

Since the enactment of the Motor Carrier Act, the Commission consistently has taken the position that to come within the exception contained in the second proviso of Section 206(a)(1), there must be a state board having power to grant or approve of public convenience and necessity *authorizing intrastate operations*, and that the carrier must have obtained an *intrastate certificate* from that board.[16] A leading case setting forth this interpretation in detail is Gulf Coast Motor Freight Lines, Inc., Common Carrier Application 3 M.C.C. 497, 500 (Oct. 8, 1937) where the Commission held that a certificate issued by the Texas State Commission did not confer upon the carrier the right to engage in operations under the second proviso of Sec. 206(a)(1). The Commission was upheld in

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[15] Sen. Document No. 152, 73rd Cong. 2d Sess. p. 46.

[16] This interpretation of the Act was first embodied in Ruling No. 5, issued August 19, 1936, which reads in pertinent part:

"Question: What is the nature of the State certificate which is to be accepted by this Commission in lieu of a finding of public convenience and necessity?

"Answer: In that part of Section 206(a) which reads as follows: * * * 'if there be a board in such State having authority to grant or approve such certificates' * * * the word 'certificate' includes an authorization by any other name and refers to authority obtained from a State for intrastate common carrier operations, which requires a showing of public convenience and necessity. The word has no reference to State authority for interstate operations notwithstanding that such authority may have been denominated a 'certificate'."

Gulf Coast Motor Freight Lines v. United States, S.D. Tex. 1940, 35 F. Supp. 136.

Plaintiff argues that this case is not in point for the reason that the Texas commission had not been authorized by state law to issue certificates of convenience and necessity, whereas this authority was granted the Montana Board by the Montana Carrier Act of 1931.[17] It is true that *Gulf Coast* expressly held that the permit under consideration was not a certificate of public convenience and necessity, but rather a permit or certificate issued under the state's police power, based on considerations of safety rather than traffic needs. On the other hand, the court held also that it was beyond the constitutional power of a state to "permit or prohibit carriage interstate on grounds of public convenience and necessity," citing Buck v. Kuykendall, supra, and other cases. The opinion continues:

> "Nor is complaining any better served by its argument that the proviso in effect grants to State Boards the authority to issue certificates of public convenience and necessity to carriers carrying interstate between points solely within the state. For the very terms of the proviso 'if there be a board in "such" state having authority to grant or approve "such" certificate,' thus conditioning the certificates upon the existence in a state of a board having 'such' authority, flatly show that Congress is invoking power already in existence, as flatly ex-

[17] Section 23, Ch. 184, L. 1931 (now R.C.M. 1947, Sec. 8-123) provides that the terms and conditions of the Act "shall apply * * * to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the Constitution of the United States, treaties made hereunder and the acts of Congress; * * *"

clude the idea that Congress is granting power."[18] (35 F. Supp. at 137).

Plaintiff relies strongly upon Oswego Transportation Lines v. Feinberg, Sup. Ct. N.Y., 1959, 181 N.Y.S. 2d 1007, aff'd. 1961, 219 N.Y.S. 2d 409, 176 N.E. 2d 916, where the court concluded that by the express language of the second proviso of Sec. 206 Congress had delegated to the "New York Public Service Commission, jurisdiction to pass on the certificate of convenience and necessity for the motor transportation of goods in interstate commerce entirely within New York." It is true that the language in *Oswego Transportation* lends support to plaintiff's position. In the light of the factual situation there presented, however, it is not persuasive. That case involved the right of a state commission to impose conditions with respect to interstate operations upon the transfer of an *intrastate* certificate, which, according to the New York court, "would have contemplated both interstate and intrastate operation." The transfer also held a prior interstate certificate issued by the Interstate Commerce Commission. In approving the transfer of that certificate, the I.C.C. had provided that the transferor should not operate in interstate commerce "by virtue of the possession of any intrastate certificate held by him. In the transfer of the state certificate, the New York Commission imposed the condition that the transferee should not engage in interstate

[18] We agree with Judge Hutcheson's opinion in this case that the proviso was "overcondensed at the expense of clarity," particularly in the overuse of the word "such", which appears eight times in the one sentance proviso.

operations in New York. In upholding the Commission, the court said that the effect of the conditions imposed by both commissions "is that the certificate cannot be used to create two operations in interstate commerce by the device of separate transfers where there has been a single operation authorized and contemplated by both public agencies." (181 N.Y.S. 2d 1014).

The result in *Oswego Transportation* was obviously correct, but we do not agree with the language upon which plaintiff relies here; nor was the approach taken necessary to the decision. The same result would have followed had the court recognized that it was simply passing upon the power of a state commission to impose a condition upon the transfer of an *intrastate* certificate.

Compare Cumberland Motor Fr. v. Huber & Huber Motor Exp., Ky. 1958, 311 S.W. 2d 398, decided under almost identical facts. There, as in *Oswego Transportation*, the court held in the transfer of an *intrastate* certificate the state commission had jurisdiction to pass upon the transfer of interstate rights; but the court expressly recognized that Sec. 206(a)(1) referred to the issuance and transfer of *intrastate* certificates. The court said in part: "If the state regulatory body had no jurisdiction to consider a transfer of the intrastate *certificates, the ques*tion of a splitting of operating rights arising from a transfer of intrastate certificates could never arise. The I.C.C. could not exercise any jurisdiction, because it has

no authority to provide for a transfer of *inter*state operating rights based upon registration under Section 206(a)(1). Those rights can exist only in favor of a carrier who holds *intra*state certificates, and obviously the I.C.C. cannot order the state regulatory body to make a transfer of the *intra*state certificates." We agree with the reasoning of the Kentucky court.[19] In any event, both cases involved interstate operating rights in connection with the transfer of an *intrastate* certificate, and not, as here, an attempt to register an *interstate* permit.

It is clear also that Congress has recognized the Commission's interpretation of Sec. 206(a)(1) in various reports on proposed amendments to this section. A report of the Senate Committee on Interstate and Foreign Commerce dated July 11, 1961, recommending amendments to Sec. 206(a)(1), reads in pertinent part:

> "The existing second proviso of Section 206(a)(1) of the Interstate Commerce Act enables motor common carriers whose operations are confined to a single State and who have been granted a certificate to allow operation within the State from their State regulatory bodies, to also engage in operations in interstate and foreign commerce. Such operations in interstate and foreign commerce must, of course, be carried on entirely within the State in which the motor carrier is certificated to operate.

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[19] See also Cumberland Motor Frgt. v. Huber & Huber Motor Exp., Ky. 1959, 328 S.W. 2d 534.

> "At present the right to engage in interstate or foreign commerce by an *intrastate carrier* is automatically obtained by filing its State certificate with the Interstate Commerce Commission. *The carrier by such filing is then authorized to engage in interstate or foreign commerce to the same extent that the carrier is authorized to engage in intrastate commerce as described in the particular State certificate filed* with the Commission."[20] (Emphasis supplied).

To what extent may this court consider "legislative history" in construing the proviso in question? As a general rule, legislative intent must be ascertained from the text of the statute if the words are clear, plain, and unambiguous.[21] Where, however, the literal words bring about an "absurd or futile result" or one "plainly at variance with the purpose of the legislation as a whole," legislative purpose is followed rather than the literal words;[22] and "there is no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on "superficial examination"."[23] In "construing a

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20 Sen. Report No. 528, 87th Cong. 1st Sess., p. 1. See also Sen. Report No. 1648, June 22, 1960, 86th Cong. 2d Sess.; House Report No. 1090, August 31, 1961, 87th Cong. Sess.; Sen. Report No. 1650, April 26, 1938, 75th Cong. 2d Sess.

21 Addison v. Holly Hill Co., 322 U.S. 607, 64 S. Ct. 1215, 88 L. Ed. 1488; Van Campp & Sons v. American Can Co., 278 U.S. 245, 49 S. Ct. 112, 73 L. Ed. 311; Fisher Flouring Mills Company v. United States, 9 Cir. 1958, reheard en banc 1959, 270 F. 2d 27; Andersoin v. United States Civil Service Commission, D. Mont. 1954, 119 F. Supp. 567.

22 United States v. Public Utilities Comm., 1953, 345 U.S. 295, 315, 73 S. Ct. 706, 97 L. Ed. 1020; United States v. American Trucking Assn's., 1940, 310 U.S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345, construing other provisions of the Motor Carrier Act.

23 Harrison v. Northern Trust Co., 1943, 317 U.S. 476, 479, 63 S. Ct. 361, 87 L. Ed. 407; United States v. American Trucking Assn's. supra.

statute not ambiguous," there may be utilized "all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress."[24] This includes reports of committees and statements of committee members in charge of a bill,[25] and the interpretation of the executive department or agency charged with its administration and enforcement.[26] An expression of opinion as to the meaning of a statute made by the same congressional committee which considered the statute may be considered, particularly where the report is made within a reasonable time after the enactment of the statute and relates specifically to the construction in question.[27]

It is our conclusion that the intent of Congress may not be ascertained from the wording of the proviso itself, and that we may properly consider the legislative history, the interpretation of the proviso made by the

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24 United States v. Universal Corp., 1953, 344 U.S. 218, 73 S. Ct. 227, 97 L. Ed. 260, where the Court said further: "Very early, Mr. Chief Justice Marshall told us 'Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived. . . .' United States v. Fisher, 2 Cranch 358, 386."

25 United States v. St. Paul M. & M. R. Co., 1918, 247 U.S. 310, 318, 38 S. Ct. 525, 62 L. Ed. 1130; Power Reactor Co. v. Electricians, 1961, 367 U.S. 396, 81 S. Ct. 1529, 6 L. Ed. 2d 924.

26 "The practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." Logan v. Davis, 1914, 233 U.S. 613, 34 S. Ct. 685, 58 L. Ed. 1121. United States v. Jackson, 1930, 280 U.S. 183, 193, 50 S. Ct. 143, 74 L. Ed. 361; United States v. American Trucking Ass'ns. supra; United States v. Short, 9 Cir, 1956, 240 F. 2d 292. Such an interpretation, however, is not conclusive. United States v. Mo. Pac. R. Co., 1929, 278 U.S. 269, 49 S. Ct. 133, 73 L. Ed. 322; County of Marin v. United States, 1958, 356 U.S. 412, 420, 78 S. Ct. 880 2 L. Ed. 2d 879.

27 Socony Mobil Oil Co. v. United States, Ct. C. 1961; 287 F. 2d 910, 914, rehearing denied 289 F. 2d 326; Sioux Tribe of Indians, v. U.S. (1942) 316 U.S. 317, 529, 62 S. Ct. 1095, 86 Fed. 1501. An interpretation by a subsequent Congress many years later, however, has been held to have little, if any significance. Rainwater v. United States, 1958, 356 U.S. 590, 593, 78 S. Ct. 946, 2 L. Ed. 2d 996.

Interstate Commerce Commission and followed consistently for more than 25 years, and the subsequent reports of the Senate and House Committees on Interstate and Foreign Commerce recognizing the Commission's interpretation in their consideration of amendments to the proviso. Considering all of these aids in determining congressional intent, we conclude that the Commission correctly rejected plaintiff's application for registration of his permit.

As the Supreme Court said in Castle v. Hayes Freight Lines, supra, under the Motor Carrier Act of 1935 the federal plan of control over carriers engaged in interstate commerce was all embracing, including exclusive power in the federal government to determine what carriers could or could not engage in interstate commerce. An exemption authorizing a state commission to issue interstate certificates of public convenience and necessity to carriers who had no corresponding intrastate rights would produce a result contrary to the policy of the Act.

The second proviso of Sec. 206(a)(1) was but one of three methods by which interstate operating rights *could be acquired or confirmed*. Those motor carriers who were in "bona fide operation" on June 1, 1935, under interstate permits issued by a state could claim exemption under the "grandfather" clause contained in the first proviso. If they could not qualify under the grandfather clause, they could apply under Sec. 207(a) for the acquisition of a new operating authority under proof of public

convenience and necessity. Plaintiff himself utilized both procedures.[28] The only reasonable construction of the second proviso consistent with the policy of the Act is that adopted by the Commission, i.e., to authorize carriers with *intrastate* certificates to obtain interstate authority over the same route without proof of public convenience and necessity under Sec. 207.

Judgment will be entered dismissing plaintiff's complaint.

Done and dated this 19th day of October, 1962.

/s/GILBERT H. JERTBERG,
United States Circuit Judge

JAMES N. BROWNING,
United States Circuit Judge

W. J. JAMESON,
United States District Judge

[28] As noted supra, plaintiff claimed "grandfather" rights with respect to both interstate permits. His application was granted as to one permit. See note 5. And in connection with the permit in question, he received authority upon proof of public convenience and necessity under Sec. 207 for operating rights covering part of the route.

APPENDIX "A" (Continued)

Opinions Below

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
BUTTE DIVISION

W. M. DANIELS,
Plaintiff,

Filed Dec. 14, 1962
Civil No. 896

vs.

UNITED STATES OF AMERICA,
Defendant,

vs.

INTERSTATE COMMERCE COMMISSION and
GREAT NORTHERN RAILWAY COMPANY,
Intervening Defendants.

PER CURIAM:

In petition for rehearing and brief in support of motion for new trial plaintiff argues that the amendment of Section 206(a)(1) of the Interstate Commerce Act, Title 49, U.S.C.A. 306(a)(1) contained in Public Law 87-805 87th Congress, S. 320, October 15, 1962, supports plaintiff's position that, prior to this amendment, plaintiff was entitled to the benefit of the exemption provision contained in the second proviso of that section. We find nothing in the act itself or its legislative history to justify this conclusion.

The legislative history as embodied in Senate Report No. 528, 87th Congress, 1st Sess. Senate Report No. 1648, 86th Congress, 2nd Session; and House Report No. 1090, 87th Congress, 1st Sess. was reviewed in the original opinion. Plaintiff's brief quotes from the explanation of S. 320 by Congressman Harris of Arkansas, which reads in pertinent part:

> "At present the right to engage in interstate or foreign commerce by an intrastate carrier is automatically obtained by filing its state certificate with the Interstate Commerce Commission. The carrier by such filing is then authorized to engage in interstate or foreign commerce to the same extent that the carrier is authorized to engage in intrastate commerce as described in the particular state certificate filed with the Commission."

The amendment deletes the second proviso of Section 206(a)(1) and prescribes the procedure for common carriers operating within a single state to engage in interstate operations within the state where a carrier has obtained a certificate of public convenience and necessity not authorizing motor vehicle common carriers operations in interstate commerce.

Plaintiff here seeks registration of a certificate authorizing interstate operations only. Plaintiff's certificate does not cover any intrastate operations; nor does plaintiff hold any other intrastate rights over the same route.

Under Section 206(a)(1) both prior to amendment and after amendment intrastate rights and an intrastate certificate form the basis of acquisition of interstate rights within the state. No grant of interstate rights is contempleaded to a carrier who has no corresponding intrastate rights. In this respect no change was effected by Public Law 87-805.

The petition for rehearing and motion for new trial are denied.

Done and dated this 13th day of December, 1962.

/s/GILBERT H. JERTBERG,
United States Circuit Judge.

/s/JAMES N. BROWNING,
United States Circuit Judge.

/s/W. J. JAMESON,
United States District Judge.

APPENDIX "B"

JUDGMENT

(Title of Court and Cause)

Filed Oct. 30, 1962

No. 896

The above cause came regularly on for hearing before the court on the 15th day of August, 1962, and was duly submitted for consideration and decision, and the court on the 22nd day of October, 1962, made and filed its written decision and order for judgment, now, therefore, pursuant thereto, it is hereby

ORDERED AND ADJUDGED that plaintiff's complaint be, and the same hereby is, dismissed on the merits.

Done and dated this 29th day of October, 1962.

/s/ GILBERT H. JERTBERG,
United States Circuit Judge.

/s/ JAMES N. BROWNING,
United States Circuit Judge.

/s/ W. J. JAMESON,
United States District Judge.

APPENDIX "C"

MONTANA STATUTES

MONTANA MOTOR CARRIER ACT ENACTED IN 1931 PROVIDES

Revised Codes of Montana, Section 8-107:

"Revocation of certificate or privilege after hearing—right of review. The board may at any time, by its order duly entered, after a hearing had upon reasonable notice to the holder of any certificate or privilege hereunder and an opportunity to such holder to be heard, at which time it shall appear that such holder violated, violates, or refuses to observe any of the board's orders, rules or regulations, or any provision of this Act, suspend, revoke, alter, or amend any certificate or privilege issued under the provisions of this Act; but the holder of any such certificate or privilege shall have all rights of rehearing and review, as to such order of the board, as is provided in this Act."

Revised Codes of Montana, Section 8-123:

"Application of act to interstate carriers and motor carriers operation in national parks. The terms and provisions of this Act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the Constitution of the United States, treaties made thereto and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein pro-

vided to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress, and provided further that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the Commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States."

Revised Codes of Montana, Section 8-124:

"Invalidity of any part of act not to affect remainder. If any section, subsection, sentence, clause, or phrase of this act is for any reason held unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislative Assembly declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional."

FEDERAL STATUTES

THE UNITED STATES LAW WEEK Statutes
October 16, 1962. The Bureau of National Affairs, Inc., Vol. 31, No. 14.

INTERSTATE COMMERCE ACT AMENDMENT

Public Law 87
87th Congress, S. 320
October , 1962

AN ACT

To amend the provisions contained in part II of the Interstate Commerce Act concerning registration of State certificates whereby a common carrier by motor vehicle may engage in interstate and foreign commerce within a State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (1) of subsection (a) of Section 206 of the Interstate Commerce Act is amended by striking out the last two sentences and by inserting in lieu thereof the following: "Pending the determination of any such application the continuance of such operation shall be lawful."

Sec. 2, Subsection (2) of Section 206 of the Interstate Commerce Act is amended by adding at the end thereof the following new paragraphs:

"(6) On and after the date of the enactment of this paragraph no certificate of public convenience and necessity under this part shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of

public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted.

Such operations in interstate and foreign commerce shall, however, be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Such rights to engage in operations in interstate or foreign commerce shall be evidenced by appropriate certificates of registration issued by the Commission which shall be valid only so long as the holder is a carrier engaged in operations solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operations outside such State, and except as provided in Section 5 and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the interstate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce.

The termination, restriction, in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or the restrictions removed within said one hundred eighty day period.

Such rights shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates issued by the Commission.

The Commission may impose reasonable requirements with respect to the filing with it of certified copies of such State certificates and other appropriate statements and data, and compliance with applicable requirements established by and under the authority of statutes applicable to interstate and foreign operations administered by the Commission, as conditions precedent to engaging in interstate and foreign operations under the authority of such State certificate.

In accordance with such reasonable rules as may be prescribed by the Commission, any party in interest, who or which opposed in the State commission proceeding may petition the Commission for reconsideration of the decision of the State commission the authorization of operations in interstate or foreign commerce, and upon such reconsideration upon the record made before the State commission, the Commission may affirm, reverse, or modify the decision of the State commission, but only with respect ot the authorization of operations in interstate and foreign commerce.

"(7)(A) In the case of any person who or which on the date of the enactment of this paragraph was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding per-

sons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this paragraph or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person' intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since that date (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person has no control, the Commission *shall* issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection.

Such certificate of registration shall not exceed in scope the services authorized by the State certificate to be conducted in intrastate commerce, and shall be subject to the same terms, conditions, and limitations as are contained in or attached to the State certificate except to the extent that such terms, conditions or limitations are inconsistent with the requirements established by or under this Act.

If the effectiveness of the State certificate is limited to a specified period of time, the certificate of registration issued under this paragraph (7) shall be similarly limited.

Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder.

Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in Section 5 and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce.

The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or the restrictions removed within said one hundred and eighty day period.

Such certificates of registration shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates of public convenience and necessity issued by the Commission.

"(B) All rights to engage in operations in interstate and foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this

paragraph, *shall cease and terminate*, but any carrier lawfully engaged in interstate and foreign operations on the date of the enactment of this paragraph or any carrier who would have been so lawfully engaged in such operations *but for the pendency of litigation* to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, pursuant to such provisions, may continue such operations for 120 days after such date and, if an appropriate application for a certificate of registration is filed within such period, such operations may be continued pending the determination of such application.

The Commission shall prescribe the form of such application, the information and documents to be furnished, the manner of filing, and the persons to whom or the manner of giving notice to interested persons of such filings.

Issues arising in the determination of such applications shall be determined in the most expeditious manner and, so far as practicable and legally permissible, without formal hearings or other proceedings.

A notice of intent to engage in interstate and foreign operations accompanied by certified copies of effective, lawfully issued or acquired State certificates filed with the Commission, as evidence of authority to operate in interstate or foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this paragraph, shall be conclusive proof that the applicant is lawfully engaged in interstate and foreign operations and the scope thereof."

Approved October , 1962.

APPENDIX "C" Continued

FEDERAL STATUTES
FEDERAL MOTOR CARRIER ACT
ENACTED IN 1935 PROVIDES

Title 29, United States Code, Section 206(a)(1):

"* * * and provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a Board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such Board."

DIRECTORY OF BUREAU OF MOTOR VEHICLES
ADMINISTRATIVE RULING NO. 5

August 19, 1936
(Sec. 206(a)(1)

"Question: What is the nature of the State certificate which is to be accepted by this Commission in lieu of a finding of public convenience and necessity?

"Answer: In that part of Section 206(a) which reads as follows: * * * "if there be a board in such State having authority to grant or approve such certificates" * * * the word "certificate" includes an authorization by any other name and refers to authority obtained from a State for intra-

state common carrier operations, which requires a showing of public convenience and necessity. The word has no reference to State authority for interstate operations notwithstanding that such authority may have been denominated a "certificate."

APPENDIX "C"

DIRECTOR OF BUREAU OF MOTOR CARRIERS ADMINISTRATIVE RULING NO. 7

August 19, 1936
Sec. 206(a)(1)

(Section 6007—Commerce Clearing House, Inc., Page 6052, 10-37, Topical Index p. 16,051)

"EXTENSION OF ROUTE ENTIRELY WITHIN A SINGLE STATE—REGISTRATION WITH I.C.C.

Ruling No. 7

August 19, 1936
(Sec. 206(a)

"Question: If a common carrier operating wholly intrastate in interstate commerce procures a certificate from the State Commission authorizing an extension wholly within the State, is anything more than registration of such extension required by the Interstate Commerce Commission?

"Answer: If a carrier operating in interstate commerce solely within a single State procures a certificate of convenience and necessity from the board of that State authorizing the extension, such operations, as extended, being wholly within such State, no proceedings other than registration with this Commission are required for such authority to be recognized as interstate authority."

CERTIFICATE OF SERVICE

I, JOHN W. BONNER, one of the attorneys for the appellant W. M. Daniels, do hereby certify that a copy of this jurisdictional statement and authorities supporting appellant's appeal was mailed by me on the _____ day of February, 1963, at Helena, Montana, and directed to the following attorneys:

Moody Brickett, United States District Attorney, Federal Building, Butte, Montana;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.

Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.;

Robert W. Giannane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Weir, Gough & Booth, and Ward A. Shanahan, Attorneys for Great Northern Railway Company, 301 First National Bank Bldg., Helena, Montana.

_____

JOHN W. BONNER, one of the Attorneys for Appellant, W. M. Daniels.

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No. 814

In the Supreme Court of the United States

OCTOBER TERM, 1962

E. M. DANIELS, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*,

vs.

INTERSTATE COMMERCE COMMISSION, and GREAT NORTHERN RAILWAY COMPANY,
Intervening Appellees.

APPEAL FROM JUDGMENT OF THREE-JUDGE FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

MOTION TO AFFIRM

Newell Gough, Jr.
Edwin S. Booth
Ward A. Shanahan
301 First National Bank Building
Attorneys For Great Northern Railway Company,
Helena, Montana

Appellee

HELENA INDEPENDENT-RECORD

In the Supreme Court of the United States

OCTOBER TERM, 1962

W. M. DANIELS, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*,

vs.

INTERSTATE COMMERCE COMMISSION, and GREAT NORTHERN RAILWAY COMPANY,

Intervening Appellees.

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of the Court, Appellee moves that the judgment of the District Court be affirmed on the grounds that the questions raised by Appellant are so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court, entered October 29, 1962, pursuant to 28 U.S.C. 2321-25 which affirmed an Order of the Interstate Commerce Commission in Docket No. MC-C-2507, *W. M. Daniels—Investigation of Second Proviso Eligibility*, denying Appellant's application for registration of an interstate certificate

under the second provisions of 49 U.S.C. 306(a)(1). The petition for re-hearing and for new trial was denied by Supplemental Opinion of the District Court issued December 13, 1962.

Appellant was issued a Certificate or Permit by the Montana Board of Railroad Commissioners authorizing *interstate* service between Missoula and Helena; Missoula and Miles City via Butte; and between Butte and Great Falls (all points are in Montana). This Certificate was issued in 1933 prior to the enactment of the Federal Motor Carrier Act (49 U.S.C., Part II) in 1935. It did not authorize any intrastate service of any kind, but only interstate service between points within the State of Montana. Application for registration of the interstate certificate was filed with the Interstate Commerce Commission on December 31, 1933, March 8, 1957 and on February 3, 1958, and was, in each instance, denied by the Commission. Thereafter, on January 23, 1959, the Interstate Commerce Commission directed investigation by the Bureau of Inquiry and Compliance in Docket No. MC-C-2507. As a result of this investigation final Order of the Interstate Commerce Commission denying the application for registration under Section 206 (a)(1) of the Motor Carrier Act was issued on November 21, 1961

Appellant filed this proceeding seeking review of the Order of the Interstate Commerce Commission by the District Court. After full briefs and argument, the District Court concluded that the Interstate Commerce Commission Order was in accordance with the applic-

able law and that the complaint should be dismissed. The Court issued its Per Curiam Opinion dated October 19, 1962, Judgment, dated October 29, 1962 and Supplemental Opinion dated December 13, 1962. The opinions are not officially reported but are set forth in Appendix "A" of Appellant's Statement of Jurisdiction.

ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. The Court has fully considered the applicable provision of the Interstate Commerce Act as applied to the record before the Commission pursuant to stipulation. The affirmance of the decision below will be fully consistent with the prior decisions of this Court.

1.

THE ONLY APPLICABLE LAW IS SECTION 49 U.S.C. 306 (a)(1) (SECTION 206 (a)(1) MOTOR CARRIER ACT)

Appellant's argument is based on a contention that the Montana Railroad Commission had a right to issue to appellant an interstate authority between points in the State of Montana, and that such an authority has to be registered by the Interstate Commerce Commission. However, at the same time appellant recognizes that authority to transact interstate business requires authority of the Interstate Commerce Commission

when he seeks to force registration of a state permit by that Commission.

The only authority, and that which appellant seeks to invoke, for registration of a state certificate by the Interstate Commerce Commission is that contained in 49 U.S.C. 306 (a) (1). It is recognized throughout the record and in the statement of jurisdiction, that appellant does not now have any corresponding intrastate authority.

So far as registration of the certificate is concerned, it is wholly immaterial whether the Montana Railroad Commission has authority to issue an interstate permit. The only agency which has been empowered by Congress to regulate motor carrier transportation in Interstate commerce is the Interstate Commerce Commission, pursuant to Part II of the Interstate Commerce Act (49 U.S.C. 301 et seq).

Appellant asserts that there is a conflict in respect to state and federal powers and the conflicting views of the decision of the Montana Supreme Court (*Daniels v. Board of Railroad Commissioners*, 131 *Mont.* 9, 306 P. 2d 264). We are concerned with interpreting a Federal law. The Montana Court has not purported to interpret the Interstate Commerce Act in the above decision. There is nothing in the above decision holding that the certificate comes within the provisions of the Federal Act. We are concerned only with rights under the Federal Act.

II.

THE ONLY AUTHORITY ISSUED BY A STATE WHICH MAY BE REGISTERED AS THE BASIS OF PERFORMING INTERSTATE BUSINESS IS AN AUTHORITY TO PERFORM INTRASTATE BUSINESS

Appellant seeks to register his authority under the provisions of the second proviso of 49 U.S.C. 306(a)(1) which reads as follows:

> "* * * And provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates anf if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter."

The certificate referred to has always been considered as a certificate authorizing intrastate service. The registration would only allow interstate service to the same extent as intrastate. The authorities are cited and adequately discussed in the Court Opinion and will not be repeated. This Court has decided, in *Buck v. Kuykendall* (1925) 267 U.S. 307, 45 S. Ct. 324, 60 L. Ed. 623, that the right of the states over interstate commerce is limited to matters of safety and use of the highways. In *Fry Roofing Co.* v. Word (1952), 344 U.S. 157, 73 S. Ct. 204, 97 L.Ed 168, the Court held

that the state could require registration of interstate authority so long as the state claimed no discretionary right to refuse to grant the permit. The Montana Motor Carrier Act provides that an interstate carrier is not required to make any showing of convenience or necessity (Section 8-123, Revised Codes of Montana, Appendix C to Appellant's jurisdictional statement).

The facts, the statutes and prior decisions cited by the District Court fully justified its conclusion in this case, stated as follows:

> "As the Supreme Court said in Castle v. Hayes Freight Lines, supra, under the Motor Carrier Act of 1935 the federal plan of control over carriers engaged in interstate commerce was all embracing, including exclusive power in the federal government to determine what carriers could or could not engage in interstate commerce. An exemption authorizing a state commission to issue interstate certificates of public convenience and necessity to carriers who had no corresponding intrastate rights would produce a result contrary to the policy of the Act.
>
> "The second proviso of § 206(a)(1) was but one of three methods by which interstate operating rights could be acquired or confirmed. Those motor carriers who were in "bona fide operation" on June 1, 1935, under interstate permits issued by a state could claim exemption under the 'grandfather' clause contained in the first proviso. If they could not qualify under the grandfather clause, they could apply under § 207(a) for the acquisition of a new operating authority upon proof of public convenience and necessity. Plaintiff himself utilized both procedures. The only reasonable construction of the second proviso con-

sistent with the policy of the Act is that adopted by the Commission, i.e., to authorize carriers with *intrastate* certificates to obtain interstate authority over the same route without proof of public convenience and necessity under § 207."

Appellants filed a petition for rehearing and motion for new trial. This petition was, in part, based on the amendment of Section 49 U.S.C. 306(a)(1) contained in Public Law 87-805, 87th Congress, October 15, 1962. This amendment is set forth in Appendix C to the jurisdictional statement. It changes the method of issuing interstate authority to operators in intrastate commerce within a single state. The amendment clearly shows that intrastate operation is essential before any interstate authority over the same route may be claimed. The Supplemental Opinion refers to the Legislative history of the amendment as requiring intrastate operation. The Court, in denying the petition for re-hearing or new trial, said:

> "Plaintiff here seeks registration of a certificate authorizing *interstate* operations *only*. Plaintiff's certificate does not cover any *intrastate* operations; nor does plaintiff hold any other *intrastate* rights over the same route.
>
> "Under section 206(a)(1), both prior to amendment and after amendment, *intrastate* rights and an *intrastate* certificate form the basis of acquisition of interstate rights within the state. No grant of interstate rights is contemplated to a carrier who has no corresponding intrastate rights. In this respect no change was effected by Public Law 87-805."

CONCLUSION

We respectfully submit that the decision of the District Court correctly interprets the applicable law. Where appellant does not hold authority to perform intrastate state business there is no authority under the Interstate Commerce Act for registration of an interstate permit issued by the state. The Motion to Affirm the judgment appealed from should be granted.

Newell Gough, Jr.
Edwin S. Booth
Ward A. Shanahan
301 First National Bank Building
Attorneys For Great Northern Railway Company,
Helena, Montana

Appellee

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 814

W. M. DANIELS, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND GREAT NORTHERN RAILWAY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, dated October 29, 1962, dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission.[1] The order rejected appellant's statement of

[1] Appellant's petition for rehearing and motion for a new trial were denied on December 14, 1962 (J.S. 41–43).

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intent (predicated upon Section 206(a)(1) of the Interstate Commerce Act) to engage in the transportation of property in interstate or foreign commerce within the State of Montana in operations corresponding to those authorized in his Montana Interstate Permit.

Prior to enactment of the Motor Carrier Act of 1935 (49 U.S.C. 301, *et seq.*), appellant obtained a certificate from the Montana Board of Railroad Commissioners authorizing various interstate, as well as intrastate, operations. By various conveyances, appellant has, over the years, disposed of all of his authorities except one reissued interstate permit described as follows (Interstate Permit M.R.C. No. 284 (reissued)):

> to transport property as a common carrier in Interstate service, Class A, by motor vehicles for hire over and on the public highways of the State of Montana, between Missoula, and Helena, Montana; between Missoula and Miles City, Montana, via Butte; and between Butte and Great Falls, Montana, * * *.

Appellant possesses no intrastate authority of any kind and conducts no operations under the above state permit. On December 31, 1938, appellant sought registration of his Montana interstate permit[2] with the Interstate Commerce Commission, relying upon the second proviso of Section 206(a)(1) of the Act. It was rejected. (Docket No. MC–54469 (Sub-No. 1).) On March 8, 1957, and February 3, 1958, appellant

[2] A 1943 reissue of this certificate is involved in this proceeding.

again sought registration of his interstate permit pursuant to the second proviso of Section 206(a)(1) of the Act. These applications were also rejected. On January 23, 1959, the Commission instituted an investigation to determine appellant's eligibility under the second proviso. The examiner found that appellant was not eligible to conduct interstate operations.

On exceptions, Division 1 of the Commission adopted the recommendations of the examiner and held that appellant had failed to establish that operations in interstate commerce corresponding to his Montana certificate would fall within the second proviso of Section 206(a)(1), and accordingly concluded that appellant's Statement of Intent to operate in interstate commerce should be disapproved and rejected. This decision is reported at 88 M.C.C. 357, and is reprinted in the appendix hereto. The ground of the decision was that the second proviso applies only to "intrastate" as opposed to "interstate" certificates. The decision of the three-judge court adopts the same view.

ARGUMENT

The decision below is clearly correct and presents no question of substantial or continuing importance. We submit, therefore, that the judgment of the court below should be affirmed.

Section 206(a)(1), as it read prior to its general revision in 1962, required a certificate of public convenience and necessity for motor carriers operating in interstate commerce, but contained two provisos. The first of these (not involved here) related to

"grandfather" operations. The second proviso stated:

> *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board.

Appellant's argument is a strictly literal one. He says that the antecedent of the words "such certificates" is the phrase "a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce." As a matter of syntax, this is a permissible reading. As a matter of common sense and of history, it is not. In our view, "such certificates" must be read to refer to a certificate of public convenience and necessity of the kind which the States are authorized to grant, *i.e.*, a certificate for intrastate operations.

Well before the passage of the Motor Carrier Act in 1935, this Court had settled the proposition that an individual State, though empowered to regulate the use of its highways in the interests of safety and conservation, had no authority to regulate the conduct of interstate commerce upon those highways. *Buck* v. *Kuykendall,* 267 U.S. 307, 314–315. In enacting the federal regulatory statute, Congress "adopted a comprehensive plan for regulating the

carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce." *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 63. So far as State Boards (or Commissions) were concerned, Congress explicitly defined them as bodies having jurisdiction to grant certificates "or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce." Section 203(a)(2), 49 U.S.C. 303(a)(2).

Appellant's argument would produce an absurd result. The Interstate Commerce Commission would be required to register a carrier as having authority to perform interstate transportation between points within a single State if that State had ostensibly conferred authority to perform such interstate transportation (authority which the States were not empowered to grant and which state statutes, with rare exception, do not assert), but would not be in a position to register carriers possessing certificates of the only kind which the States conventionally issue (certificates authorizing intrastate carriage).

The purpose of the second proviso of Section 206 (a)(1) is obvious. Motor carriers frequently connect with one another and interline traffic. Thus, in some circumstances and on some occasions, a carrier operating solely within a single State may be engaged in interstate commerce. Congress was of the view that local carriers authorized by State Boards should not be required, however, to go through federal certifica-

tion proceedings to cover transportation which was "interstate" only because of its connection with the operations of another carrier. Certainly, it is apparent from the entire scheme of the federal Act that Congress was not proposing to make it a state function to issue certificates for interstate operations.

The consistent administrative interpretation confirms this view. Since 1936, the Commission has consistently construed the Act as requiring presentation of a state-issued intrastate authority, rather than a state certificate purporting to grant interstate authority. As the court also noted (J.S. 32), this interpretation was set forth in 1937 in a Commission ruling,[3] and was subsequently upheld by a district court[4] on the only occasion that the issue was directly presented.[5]

As the above makes clear, the issue is not a recurrent one. More than that, however, the 1962 revision of Section 206(a)(1) (J.S. 47–52), which establishes a new method of issuing interstate authority to intrastate carriers, places it beyond dispute that the right to engage in interstate transportation within a State under that Section turns on the State's issuance of

[3] The ruling was elaborated in *Gulf Coast Motor Freight Lines, Inc., Common Carrier Application*, 3 M.C. 497, 500, affirmed, *Gulf Coast Motor Freight Lines, Inc.* v. *United States*, 35 F. Supp. 136 (S.D. Tex.).

[4] *United States* v. *Union Pacific R. Co.*, 20 F. Supp. 665 (D. Idaho).

[5] *Oswega Transportation Lines* v. *Feinberg*, 181 N.Y. Supp. 2d 1007, contains dicta supporting appellant's position, but, as the court below pointed out, the issues in that case were quite different (J.S. 34–35).

"a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce" (J.S. 47–48).

It remains only to add that Congress did not regard the amendment as effectuating any change of law in the respect material to this case. The relevant committee report (S. Rep. No. 528, 87th Cong., 1st Sess., pp. 1–2) stated:

> The existing second proviso of Section 206 (a)(1) of the Interstate Commerce Act enables motor common carriers whose operations are confined to a single State and who have been granted a certificate to allow operation within the State from their State regulatory bodies, to also engage in operations in interstate and foreign commerce. Such operations in interstate and foreign commerce must, of course, be carried on entirely within the State in which the motor carrier is certificated to operate.
>
> At present the right to engage in interstate or foreign commerce by an intrastate carrier is automatically obtained by filing its State certificate with the Interstate Commerce Commission. The carrier by such filing is then authorized to engage in interstate or foreign commerce to the same extent that the carrier is authorized to engage in intrastate commerce as described in the particular State certificate filed with the Commission.

In summary, the issue is narrow, the decision below clearly correct and the law for the future settled by statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
ARTHUR J. MURPHY, JR.,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
ARTHUR J. CERRA,
Assistant General Counsel,
Interstate Commerce Commission.

MARCH 1963.

APPENDIX

INTERSTATE COMMERCE COMMISSION

No. MC–C–2507

W. M. DANIELS—INVESTIGATION OF SECOND PROVISO ELIGIBILITY

Decided November 21, 1961

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

WEBB, *Commissioner:*

Exceptions to the order recommended by the examiner were filed by W. M. Daniels, hereinafter called respondent; and the Bureau of Inquiry and Compliance, Interstate Commerce Commission, Great Northern Railway Company, Consolidated Freightways Corporation of Delaware, and Northwest Freight Lines, Inc., hereinafter referred to by abbreviated names, replied.

By a statement (form BMC–75) submitted to the Commission on February 3, 1958, respondent, of Butte, Mont., the holder of interstate permit M.R.C. 284 (reissued),[1] issued to him by the State of Montana, Board of Railroad Commissioners, on March 8,

[1] An abstract of the pertinent portions of this permit appears in the appendix to this report.

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1943, gave notice of his intent to engage in the transportation of property, in interstate or foreign commerce in Montana under the second proviso of section 206(a)(1)[2] of the Interstate Commerce Act, in operations corresponding to those authorized in the Montana permit.

By order entered January 23, 1959, division 1, on its own motion, instituted an investigation to determine (1) the acceptability of such filing, and (2) whether respondent may lawfully engage in for-hire transportation, in interstate or foreign commerce, within the State of Montana under the second proviso of section 206(a)(1) of the act, in operations corresponding to those authorized in the Montana permit. By order of May 23, 1960, the matter was assigned for handling under the modified procedure, and the statement of facts contained in a joint stipulation of the Bureau and respondent was received in evidence. The Bureau, Great Northern, Consolidated, and Northwest oppose the registration. The Board of Railroad Commissioners of the State of Montana, hereinafter called the board, appeared to state its position with regard to respondent's Montana permit.[3]

---

[2] "*And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.".

[3] The words "permit" and "certificate" are used interchangeably by the board, and the permit will hereinafter be referred to as a certificate.

The examiner found that the aforementioned certificate 284 was not acceptable for filing under the second proviso, and that respondent could not lawfully engage in operations in interstate or foreign commerce, pursuant to such certificate. The salient facts are adequately set forth in the examiner's report, and need not be repeated in detail in this report.

On July 21, 1933, the board issued to respondent a certificate in the same form as the one involved here, covering operations between Missoula, Butte, and Helena, Mont. Later, on December 19, 1933, a similar certificate was issued for operations between Butte and Miles City. These operations were consolidated in one certificate dated September 24, 1934. On January 5, 1935, an additional point, Great Falls, was authorized and at that time a certificate substantially similar to the one involved here was issued. The certificate in such form was reissued on January 22, 1936. When reissued on March 8, 1943, the board's order included the statement:

> This order is made merely for the purpose of correcting the form of said certificate No. 284 previously issued on January 22, 1936, by proper segregation and for no other purpose, and shall not be considered as a passing on or a determination of the rights of the holder of said certificate as originally issued, or by operation thereunder.

On May 18, 1951, the board canceled respondent's certificate, without notice or opportunity for hearing. This action was reversed by the Montana Supreme Court in *State* v. *Board of Railroad Commissioners*, 131 Mont. 9, 306 P. (2d) 264 (1957). The board was directed to reinstate the certificate because the Montana court held that lack of notice and hearing vio-

lated due process of law. Respondent conducts no operations under the certificate.

Attempted registrations of his certificate under the second proviso on December 13, 1938, March 1957, and February 3, 1958, were rejected by the Commission or Commission representatives. The stated reason for rejection was that the second proviso applies only to "intrastate" certificates and not "interstate" certificates as here involved. The examiner's conclusions in the instant proceeding are based on the same ground.

CONTENTIONS OF THE PARTIES

Here, in his brief and on exceptions, respondent contends that the certificate is within the purview of the proviso; that his Montana certificate is an express grant of authority based on a showing of public convenience and necessity; and that considering that the certificate was issued prior to passage of the Motor Carrier Act of 1935 on August 9, 1935, interstate operations may be conducted under the certificate.

The Bureau, in its reply, contends that the prior administrative determinations and findings are correct; that the State of Montana could not decide for itself which carriers were or were not to engage in interstate operations, since such regulation is in violation of the Commerce Clause of the Constitution of the United States; and that the examiner's findings should be upheld. Great Northern contends that the Montana certificate, as a matter of Montana law, was not issued under a showing of public convenience and necessity, and that, therefore, such certificate is not within the proviso. Consolidated and Northwest, in joint pleadings, contend that the lack of operations precludes a registration of the certificate. The board, in its brief, states that prior to the Motor Carrier Act

of 1935, interstate certificates were issued by it on a showing of public convenience and necessity; and that although it considers such certificates of no effect, it is bound by the decision of the Montana Supreme Court with respect to respondent's certificate.

DISCUSSION AND CONCLUSIONS

We must determine whether or not respondent may operate in interstate or foreign commerce pursuant to registration of his Montana certificate under the second proviso. Since respondent's certificate dated March 8, 1943, was effective prior to the effective date of the Motor Carrier Act of 1935 we will consider it as having been issued prior thereto.

The language of the second proviso is somewhat ambiguous because of the phrase "if there be a board in such State having authority to grant or approve such certificates." Respondent contends that "such certificates" refers back to the immediate antecedent phrase "a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce." In *Gulf Coast Motor Frt. Lines, Inc., Com. Car. Application,* 3 M.C.C. 497, former division 5, in discussing the second proviso, said:

> Our administrative interpretation is, we think, supported and justified by sound rules of construction. Such construction requires a slight departure from the strict rules of grammar in ascertaining the antecedent of the words "such certificates" in the phrase "if there be a board in such State having authority to grant or approve such certificates." There is no difficulty in interpreting the word "certificates" as meaning certificates of public convenience and necessity because of the statutory definition in section 203(a)(5) and in its use elsewhere in

the act. The difficulty which we encounter, however, is in determining whether in the use of the words "such certificates" Congress intended certificates covering interstate commerce or certificates covering intrastate operations, since the immediate antecedent of the word "such" is the phrase "certificate of public convenience and necessity issued by the Commission authorizing such operations" and the ordinary rules of grammar usually require an interpretation of the word "such" as referring to its nearest antecedent.

The word "such" is defined by lexicographers as "of that kind; of the same or like kind; identical with or similar to something specified or implied; * * * being the same as what has been mentioned or indicated; being the same in quality; having the quality specified, etc." *In Re Hull*, 18 Idaho 475, 110 Pac. 256, 60 Corp. Jur. 986, *Words & Phrases*, 1st, 2d, 3d, and 4th series.

That the word "such," used in connection with "certificates," cannot mean "the same" or "identical with" is evident, because the certificate referred to in the forepart of section 206(a) is a particular certificate which can be issued only by the Interstate Commerce Commission. And since "such" cannot mean "the same" or "identical with" the particular certificate mentioned, we are compelled to accept other meanings of "such," viz., "similar to that specified" or "having the quality specified." The language of the condition of the proviso consequently becomes, paragraphed "if there be a board in such State having authority to grant or approve certificates of public convenience and necessity with respect to intrastate operations similar to those required by the Interstate Commerce Commission for interstate operations."

In *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), the Supreme Court held that the State of Washington could not deny an applicant the right to use Washington highways in connection with interstate operations between Portland, Oreg., and Seattle, Wash., where such denial was based on economic grounds, or failure to show public convenience and necessity. The Supreme Court held that such economic regulation was forbidden by the Commerce Clause.

Thereafter, a Federal district court held that the State of Texas had no discretionary power to permit or to forbid interstate operations wholly within Texas, where the applicant was a connecting line carrier on interstate traffic. *Galveston Truck Line Corp.* v. *Allen*, 2 F. Supp. 488 (S.D. Tex. 1933). At page 489 the court stated:

> no difference in principle can, we think, be drawn between a link in interstate commerce which operates wholly within a State, and one which crosses the State line.

The district court allowed time for the issuance of a permit, but stated that in the absence thereof, the carrier could operate anyway. The Supreme Court cited *Buck* v. *Kuykendall, supra*, in its *per curiam* opinion affirming the lower court. *Allen* v. *Galveston Truck Line Corp.*, 289 U.S. 708 (1933).

Since the States could not regulate interstate or foreign commerce on economic grounds, it is clear that a State certificate of public convenience and necessity was not a condition precedent to interstate operations prior to the passage of the Motor Carrier Act of 1935. Insofar as respondent is concerned, interstate operations prior to the act could have been conducted without the Montana certificate. On the other hand, a certificate of public convenience and

necessity grants authority to perform operations which cannot be lawfully performed in its absence. The respondent does not hold such a certificate, and the document which purports to authorize interstate operations is a nullity unless the Congress intended the Commission to accept such documents for filing.

The Congress could have made State-issued interstate certificates eligible for filing under the second proviso as well as State certificates authorizing intrastate operations. Since the Congress' power over interstate commerce is plenary, we do not agree with the Bureau's contention that the Congress could not have recognized as valid in 1935, certificates which were of no force or effect when issued. No such intent, however, is reflected in the language of the statute. Moreover, no such intent is manifested in the legislative history of the Motor Carrier Act.

Some indication of a contrary intent is shown by the following definition of "State board" in section 203(a)(2) of the act.

> The term "board" or "State board" means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

The phrase "to grant or approve certificates of public convenience and necessity * * * in intrastate commerce" should be read *in pari materia* with the second proviso phrase "to grant or approve such certificates." We interpret the language in the pro-

viso to mean "to grant or approve certificates of public convenience and necessity in intrastate commerce." A similar conclusion was reached in the *Gulf Coast* case, *supra*. That proceeding involved an attempted registration of a Texas interstate permit issued on grounds other than public convenience and necessity subsequent to the passage of the Motor Carrier Act. Former division 5 rejected the filing because it was an "interstate" permit saying:

> Review of the legislative history of the proviso is a proper resort in this case for the ascertainment of the intent of Congress, since the language is not entirely free from ambiguity. The measure which became the Motor Carrier Act, 1935, was proposed in the report of the Federal Coordinator of Transportation of January 21, 1935, as appendix VII of the bill which was introduced as S. 1629. It was, in fact, a revision of the former motor-carrier bill submitted by the Coordinator in his earlier report of March 19, 1934, which in its turn was based largely upon the Rayburn Bill then under consideration by Congress. An examination of the Rayburn Bill indicates that it was drawn upon the theory that the Federal Government would not exercise any jurisdiction over carriers operating between points in the same State, even though they were engaged in transporting persons or property in interstate commerce. In the hearings upon that bill before the House committee the definition of interstate commerce in the bill was criticized in respect to its exclusion of commerce physically intrastate but actually interstate, as being an attempt by legislative fiat to change interstate commerce into intrastate commerce. It was suggested that the bill should merely relieve a carrier operating in intrastate commerce under a State intrastate certificate from having to obtain a Federal

certificate in order to engage in interstate transportation within the State. In the Coordinator's first motor-carrier bill the criticized definitions of the Rayburn Bill were modified and the forerunner of the present proviso was inserted.

In the course of its passage through Congress the proviso contained the following sentence: "In any such case the Commission shall have no authority to issue any such certificate." This sentence appeared between the two sentences now constituting the proviso, but it was eliminated in the Senate committee report as merely an unnecessary restriction.

It will thus be seen that the legislative history of the bill clearly indicates the intention of Congress to change the original proposal, which was that no jurisdiction should be exercised at all over commerce carried on wholly between two points within a given State, in favor of the proposition that the intrastate operator lawfully operating in intrastate commerce under a certificate of public convenience and necessity issued by a State should have the right to transport passengers and property in interstate commerce between points covered by his intrastate certificate without obtaining a similar certificate from this Commission. It follows that since applicant has not obtained a certificate from the Railroad Commission of Texas authorizing the transportation of property in intrastate commerce within Texas, it has no right to continue operations under the second proviso of section 206(a).

The Commission's interpretation was upheld in *Gulf Coast Motor Freight Lines, Inc.*, v. *United States*, 35 F. Supp. 136 (S.D. Tex. 1940). Significantly, in 1938, the subcommittee of the Committee on Interstate Commerce, United States Senate, heard testimony on a bill, S. 3606, Seventy-fifth Congress, to amend the Interstate Commerce Act. This same

question was again squarely in issue. The proponents of an amendment to make no distinction between intrastate operations and interstate operations conducted wholly within a single State were unsuccessful.

Respondent further contends that the decision of the Supreme Court of Montana in *State* v. *Board of Railroad Commissioners, supra*, should be given full faith and credit. That decision did not attempt to deal with the applicability of the second proviso and need not be considered in that respect. The Montana court stated, however, in determining whether or not respondent was deprived of property without due process of law, that the board attempted to deprive respondent of the right granted to operate as a motor carrier in interstate commerce. The court added that the Motor Carrier Act of 1935 would not affect State interstate certificates granted prior thereto. The Montana court's decision would only be applicable to whatever rights respondent may have under Montana law by virtue of his certificate. The Commission recognizes the right of a State court to interpret State certificates. *Sullivan Transfer & Storage Co.* v. *Neylon*, 66 M.C.C. 348. The Montana Supreme Court, however, has no jurisdiction to determine respondent's rights under the Interstate Commerce Act. Congress has left such determinations to the Commission and to the Federal courts. Cf. *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954); *Service Storage & Transfer Co., Inc.* v. *Virginia*, 359 U.S. 171 (1959).

We find that W. M. Daniels has failed to establish that operations by him in interstate or foreign commerce, corresponding to his certificate issued by the State of Montana, fall within the partial exemption of the second proviso of section 206(a)(1) of the Interstate Commerce Act; and that, therefore, the

statement of intent to operate in interstate or foreign commerce by W. M. Daniels, should be disapproved and rejected.

We further find that W. M. Daniels may not conduct operations, in interstate or foreign commerce, corresponding to his certificate issued by the State of Montana in the absence of appropriate authority from this Commission.

An appropriate order will be entered.

APPENDIX

Interstate permit M.R.C. 284 (reissued)

Pursuant to the provisions of Chapter 310, Revised Codes of Montana, 1935, and the finding heretofore made by the Board that public convenience and necessity require such operations, W. M. Daniels, * * * is hereby authorized to transport property as a common carrier in Interstate service, Class A, by motor vehicles for hire over and on the public highways of the State of Montana, between Missoula, and Helena, Montana; between Missoula and Miles City, Montana, via Butte; and between Butte and Great Falls, Montana, * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 814

W. M. DANIELS, *Appellant*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND GREAT NORTHERN RAILWAY COMPANY,

Defendant.

Appellant's Brief Opposing Appellees' Motions to Affirm

JOHN W. BONNER,
SIDNEY O. SMITH,,
Attorneys for Appellant
03 Union Bank Bldg.
Helena, Montana

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Defendant.

Appellant's Brief Opposing Appellees' Motions to Affirm

Pursuant to Rule 16, paragraph (3), Revised Rules of this Honorable Court, Appellant, W. M. DANIELS, files this brief in opposition to motions to affirm.

STATEMENT

This proceeding involves the interpretation of Secs. 201 et seq., Title 49 U. S. C., Federal Motor Carrier Act of 1935, and the eligibility for registration under said Act of the interstate certificate

issued to appellant in 1933 under the Montana Motor Carrier Act of 1931.

Appellant contends the statute, Sec. 206(a)(1), second proviso, means just what it says. Where is there any wording in the statute which states as a condition precedent to registering a state-issued interstate certificate that the carrier must possess an intrastate certificate? We find no such provision in the statute.

The issue is a recurring one requiring interpretation of Sec. 206(a)(1), second proviso, Title 49, U. S. C., by this Honorable Court to finally determine the intention of Congress in respect to the mutual comity and cooperation between the federal and state governments at the time of the passage of the Federal Act on April 16, 1935.

ARGUMENT

Senator Burton K. Wheeler, Senator from Montana and Chairman of the Interstate Commerce Committee of the Senate, immediately prior to the vote upon the Federal Act of 1935 explained the grant and delegation of power under the commerce clause to the States as follows:

> "Where a common carrier is engaged in interstate transportation but conducts his operations solely within a State and holds a certificate

> from that State, he is not required to apply for a federal certificate but is otherwise subject to federal registration." (72 Congressional Record, p. 5654).

Appellant relies upon the plain language of Sec. 206(a)(1) that the interstate certificate issued to him in 1933 by the Montana board is eligible for registration with the Interstate Commerce Commission, which contention is supported by the explanation of Senator Burton K. Wheeler as above quoted.

Sec. 206(a)(1), second proviso, Title 49 U. S. C., provides:

> "* * * and provided further, that this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a Board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such Board."

Congress did not expressly nor impliedly terminate or cancel any State-issued interstate certificates which were known to be in existence. As appears from the decisions of this Court and State and lower federal courts, many State-issued interstate certificates had been in existence for many years prior to

the Federal Act of 1935. Congress must have been well aware of the outstanding State-issued interstate certificates, some of which were required to be issued by decisions of this court and other courts throughout the country. Congress recognized previously issued interstate certificates by the grant and delegation of power to the States as expressly provided in Sec. 206(a)(1).

Administrative Ruling No. 7 by the Director of Bureau of Motor Carriers, dated August 19, 1936, provides for extensions by the States of certificates held by carriers operating in interstate commerce solely within a single State if the carrier procured a certificate of convenience and necessity from the Board of a State authorizing the extension and no proceedings other than registration with the Interstate Commerce Commission being required for such authority to be recognized as interstate authority. (J. S. p. 54).

Administrative Ruling No. 5 by the Director of Bureau of Motor Carriers, dated August 19, 1936, which is relied upon by appellee Commission for its refusal to register the State-issued interstate certificate involved herein, constitutes unlawful legislating by interpretation, for the reason that the provisions of Sec. 206(a)(1), Title 49, U. S. C., do not require as a condition precedent for lawful operations under

either the State or Federal Acts for the transportation of property in interstate commerce solely between points within the State of Montana intrastate that the carrier herein, the appellant, must possess an intrastate certificate for the transportation of property in intrastate commerce between points within the State of Montana. (J. S., p. 5, 6. On line 10 of page 15 of J. S., reference to Director's Ruling No. 7 should read No. 5, and the same change to be made on line 2 of page 16 of J. S.).

AUTHORITIES

Decisions of this Court relied upon by appellees were decided prior to the enactment of the Federal Motor Carrier Act of 1935 wherein consideration was no tgiven to the grant and delegation of powers to the States by Congress in 1935 as herein contended by appellant.

Oswego Transportation Lines v. Feinberg, 181 N.Y.S. 2d 1007; aff'd. 219, N.Y.S. 2d 409, 276 N.E. 2d 916 (J. S., p. 11).

VALIDITY OF STATE STATUTES

Mr. Justice McReynolds in the dissent in Buck v. Kuykendall, 267 U.S. 307, (1925), and Bush & Sons v. Maloy, 267 U.S. 317, (1925), cites Olsen v.

Smith, 195 U.S. 332, 341, re to the determination of the validity of State statutes by State courts, viz:

> "For the purpose of determining the validity of state statutes in their Federal aspect, this court accepts the interpretation given to the statute by the state court and tests their validity accordingly."

The Montana Supreme Court in Interstate Transit Co. v. Derr (1924), ___Mont.:___, 22 P. 624, interpreted the earlier Montana Motor Carrier Act which contains provisions similar to those used in the Montana Motor Carrier Act of 1931; (Sec. 8-123, R.C.M. 1947, J.S. 45), as follows:

> "Was it the intention of the Legislature in enacting Chapter 154 that the same should apply at all to interstate commerce? If it was not, then clearly no compliance with its provisions on the part of the plaintiff is required. Section 10 of the act above quoted seems to answer that question, since it provides that the provisions of the act shall not be construed to apply to commerce among the states, except insofar as may be permitted by the Constitution of the United States and the acts of Congress, indicating a clear legislative intent that its provisions shall apply to interstate traffic insofar as the Constitution and the acts of Congress permit. * * *."
>
> "It is, of course, a fundamental principle of law that a state may not directly regulate, prohibit, or burden interstate commerce. Gibbons v. Ogden, 9 Wheat 1, 6 L. Ed. 23."

In view of the foregoing interpretation of the language of the Montana Act, it should be held to be constitutional and that appellant's State-issued interstate certificate authorizing the transportation of propery in interstate commerce is a valid and lawful certificate authorizing the operations therein provided, without being subject to the statutory penalties under the Federal Act.

The Montana Board both prior to and after the enactment of the Federal Motor Carrier Act of 1935 possessed no discretionary power to withhold certificates of public convenience and necessity from common carrier motor carriers engaged exclusively in interstate commerce between points within the State of Montana as provided in appellant's interstate certificate. Savings provisions of Act (J. S., p. 46.).

Atlantic-Pacific Stages v. Stahl, (1929), D. C., 36 F. 2d 260; 85 A.L.R. 1138; 109 A.L.R. 1235.

Fry Roofing Co. v. Word (1952), 344 U.S. 157, 73 S. Ct. 168, 97 L. Ed. 168.

Stephenson v. Binford, (1931) D. C., 53 F. 2d 509, affirmed on other grounds (1932) 287 U.S. 251, 77 L. Ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

The Montana board originally issued the Class "A" common carrier motor carrier interstate permit as a certificate of public convenience and necessity in 1933 because the application sought the operation

between fixed termini and over a regular route. Class "B" certificates were issued to carriers operating under regular rates or charges and not between fixed termini or over a regular route. Class "C" certificates were issued to carriers operating under contract, charter, agreement or undertaking.

Appellee Commission admits the certificate in question dated March 8, 1943, was effective prior to the effective date of the Motor Carrier Act of 1935. No question was ever raised before in respect to the validity of the certificate or its recognition by the Interstate Commerce Commission, although it had knowledge of the existence of the certificate. No showing appears in the record that the Montana board or courts construed the Montana Act to intend that the State of Montana could decide for itself which carriers were or were not to engage in interstate operations.

Other intrastate and interstate certificates were held by appellant at various times but any proceedings had before the appellee Commission in respect to those certificates should not be confused with the interstate certificate involved herein which is separate and distinct. No prior attempts have been made by appellant to qualify this certificate under the Federal Act that would bar this proceeding and litigation. The proceedings to which the lower court

refers at page 40 of the J. S. pertained to a Class "C" contract carrier certificate issued May 13, 1936, and found not to be a common carrier certificate, *decided in 1942* and reported in 32 M.C.C. 585. It was *in 1957* the Montana Supreme Court upheld the validity and existence of the interstate certificate involved herein. (W. M. Daniels v. Board of Railroad Commissioners, 131 Mont. 9, 306 Pac. 2d 264).

CONCLUSION

Appellees' motions to affirm are without merit and should be denied. The judgment of the lower three-judge court should be reversed without further argument and judgment entered in favor of appellant and motion is made therefor by appellant.

Respectfully submitted.

JOHN W. BONNER,
SIDNEY O. SMITH,
Attorneys for Appellant.

CERTIFICATE OF SERVICE

I, JOHN W. BONNER, one of the attorneys for the appellant, W. M. Daniels, do hereby certify that a copy of this brief in opposition to appellees' motions and briefs to affirm and authorities supporting appellees' appeal, was mailed by me on the ..... day of March, 1963, at Helena, Montana, and directed to the following attorneys:

Moody Brickett, United States District Attorney, Federal Building, Butte, Montana;

Archibald Cox, Solicitor General, Department of Justice, Washington 25, D. C.;

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.;

Robert B. Hummel, Attorney, Department of Justice, Washington 25, D. C.;

Arthur J. Murphy, Jr., Attorney, Department of Justice, Washington 25, D. C.;

Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Weir, Gough & Booth and Ward A. Shanahan, Attorneys for Great Northern Railway Com-

pany, 301 First National Bank Building, Helena, Montana.

JOHN W. BONNER,
Attorney at Law
303 Union Bank Bldg.
Helena, Montana

One of the attorneys for Appellant,
W. M. Daniels.